STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 20, 2015
v	No. 322410 Roscommon Circuit Court
SCOTT DALE CORNWALL, Defendant-Appellant.	LC No. 11-006395-FC

Before: MARKEY, P.J., and STEPHENS and RIORDAN, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of second-degree criminal sexual conduct ("CSC II"), MCL 750.520c(1)(b)(*ii*) (relationship), but was acquitted of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(b)(*ii*), one count of assault with a dangerous weapon (felonious assault), MCL 750.82, and one count of possession of a firearm during the commission of a felony ("felony-firearm"), MCL 750.227b. Defendant was sentenced to 57 to 180 months' imprisonment. We granted his delayed application for leave to appeal. For the reasons stated below, we affirm defendant's conviction and the trial court's order of restitution, but remand this case to the trial court for further proceedings.

I. FACTUAL AND PROCEDURAL BACKGROUND

In May 2011, the 13-year-old victim and the defendant, who is the victim's uncle by marriage, traveled to a secluded campsite in the middle of the woods in Roscommon County, Michigan. The victim previously viewed defendant as a father figure and had camped at the site several times with family members, including defendant. Defendant picked up the victim on Thursday evening and drove the victim to the campsite, where Eric Blount—whose family owned the campsite—was already present. The victim's mother planned to meet them at the campsite on Saturday.

After the parties arrived, separate tents were set up for Blount and the victim. Defendant planned to sleep on a mattress in the back of his truck, which he had done on previous occasions. The victim then sat at a campfire with Blount and defendant. Both defendant and Blount were drinking and smoking marijuana. The victim then retired to her tent at approximately 8:30 or 9:00 p.m.

In the middle of the night, the victim awoke to find defendant in her bed. She awoke because she could feel the pain of defendant's finger in her vagina. During the episode, defendant also put his hands in her bra, kissed her neck, and made her rub his penis. She testified that she did not know if there was penile penetration during the incident. When she started to cry and make noise, defendant put his hand over her mouth and told her to "shush." Defendant eventually got up and sat on the corner of the air mattress on which the victim was lying, telling the victim that he was sorry and that this was his wife's fault because she was not intimate with him. Ultimately, defendant exited the victim's tent after the victim went back to sleep.

The next morning, defendant asked the victim to go on a walk with him, and she complied, feeling as though she had no choice. While they were walking, defendant pointed a gun at her and stated that she could not tell anyone what had happened, or else "something bad" would happen. Later that day, the victim called her mother from inside defendant's truck, explaining that she wanted to come home. However, she did not tell her mother about the assault because she could see defendant "playing with his gun" at the fire pit. She did not leave her tent during the rest of the day on Friday and did not eat any meals. When she went to sleep on Friday night, she put boxes in front of the door of her tent so that she would wake up if defendant returned. The next morning, the victim and defendant left the campsite and returned home.

When the victim and defendant returned to defendant's house, she immediately walked across the street to her grandfather's house and told him about the assault. She was hysterical and crying. She was taken to the hospital because she had not eaten for a significant period of time and for the purpose of conducting a rape kit test. Following the incident, she also received counseling and continued to struggle with ongoing fear, nightmares, and panic attacks.

After his conviction and sentencing, defendant signed a notice of appeal rights. However, he did not sign the request for the appointment of an appellate attorney. Later, the trial court granted defendant's delayed request for appellate counsel. His attorney was permitted to withdraw, and a second attorney was appointed as appellate counsel. His original appellate attorney never filed an application for leave to appeal within the time allowed.

On June 7, 2013, defendant filed a motion for relief from judgment, which the trial court denied on the basis that "defendant asserts that his failure to file a timely appeal was due to defense counsel's failure to instruct the defendant to do so." In lieu of granting leave to appeal, this Court reversed the circuit court's order, remanded "for detailed findings of fact and conclusions of law under MCR 6.508(E)," and stated that the original appointed counsel's "failure to file an application for leave to appeal within the time allowed establishes good cause for defendant's failure to raise these issues on appeal." *People v Cornwall*, unpublished order of the Court of Appeals, entered March 17, 2014 (Docket No. 318636).

In its opinion and order on remand, the trial court provided a detailed account of the facts, but it did not consider defendant's claims of error on the basis that defendant had "failed to show 'good cause' as required" under the court rule in light of the instructions that were included on the notice of appeal rights. Accordingly, the court again denied defendant's motion for relief from judgment. It subsequently denied defendant's motion for reconsideration, noting that this Court did not address the additional requirement of actual prejudice under MCR 6.508(D)(3) in

its order, and reiterating its conclusion that defendant failed to satisfy the requirements for relief from judgment under the court rule. Defendant then filed a delayed application for leave to appeal, which we granted. *People v Cornwall*, unpublished order of the Court of Appeals, entered September 19, 2014 (Docket No. 322410).

II. REVIEW OF DEFENDANT'S APPEAL

Defendant first argues that we should enforce our March 17, 2014 order, under which we concluded that good cause was established for defendant's failure to appeal and ordered the trial court to provide detailed findings of fact and conclusions of law under MCR 6.508(E). However, consistent with our order granting defendant's application for leave to appeal, we will review defendant's claims of error in the instant appeal. See MCR 7.216(A)(7).

In addition, we conclude that the trial court abused its discretion when it denied defendant's motion for relief from judgment and defendant's motion for reconsideration. See *People v Swain*, 288 Mich App 609, 628; 794 NW2d 92 (2010) ("We review a trial court's decision on a motion for relief from judgment for an abuse of discretion and its findings of facts supporting its decision for clear error."). As an inferior tribunal, the trial court was bound by our prior ruling under the law of the case doctrine. *In re Forfeiture of $19,250*, 209 Mich App 20, 30; 530 NW2d 759 (1995). In our remand order, we clearly stated that defendant had established good cause. *People v Cornwall*, unpublished order of the Court of Appeals, entered March 17, 2014 (Docket No. 318636). As such, the trial court was bound by our determination and was not permitted to deny defendant's motion for relief from judgment based on a finding that defendant did not establish good cause. *In re Forfeiture of $19,250*, 209 Mich App at 30. In so ruling, the trial court necessarily abused its discretion. *People v Waterstone*, 296 Mich App 121, 132; 818 NW2d 432 (2012) ("A trial court necessarily abuses its discretion when it makes an error of law."). Although the trial court subsequently stated in its order denying defendant's motion for reconsideration that this Court failed to address the second prong of actual prejudice under MCR 6.508(D)(3), thereby implying that it previously found that defendant failed to establish actual prejudice under its previous order, a review of the trial court's opinion following our remand order clearly indicates that the trial court denied defendant's motion for relief from judgment only on the basis that defendant failed to establish good cause.

Therefore, given our previous order concluding that defendant established good cause, we consider the merits of the issues raised by defendant in his brief on appeal in order to provide guidance for the trial court in determining whether defendant suffered actual prejudice for purposes of MCR 6.508(D)(3) and, as a result, whether defendant is entitled to relief from the judgment.

III. SCORING OF THE SENTENCING GUIDELINES

A. JUDICIAL FACT-FINDING

We first address defendant's argument that his constitutional rights were violated when the trial court scored the sentencing guidelines using judicially-found facts. We agree.

1. STANDARD OF REVIEW

Because defendant did not object to the trial court's scoring of the OVs on the basis that his constitutional rights were violated by judicial fact-finding, we review defendant's claim for plain error affecting substantial rights. *People v Lockridge*, ___ Mich ___; ___ NW2d ___ (2015) (Docket No. 149073); slip op at 30, citing *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999).

2. ANALYSIS

In *Lockridge*, the Michigan Supreme Court recently held that "the rule from *Apprendi v New Jersey,* 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), as extended by *Alleyne v United States,* 570 US ___; 133 S Ct 2151; 186 L Ed 2d 314 (2013), applies to Michigan's sentencing guidelines and renders them constitutionally deficient." *Lockridge*, ___ Mich at ___; slip op at 1. As such, "to the extent that the OVs scored on the basis of facts not admitted by the defendant or necessarily found by the jury verdict increase the floor of the guidelines range, i.e. the defendant's 'mandatory minimum' sentence, that procedure violates the Sixth Amendment." *Id*. at ___; slip op at 11. Accordingly,

> [t]o remedy the constitutional violation, [the Court] sever[ed] MCL 769.34(2) to the extent that it makes the sentencing guidelines range as scored on the basis of facts beyond those admitted by the defendant or found by the jury beyond a reasonable doubt mandatory. [The Court] also str[uck] down the requirement in MCL 769.34(3) that a sentencing court that departs from the applicable guidelines range must articulate a substantial and compelling reason for that departure. [*Id*. at ___; slip op at 2.]

Moreover, the Court stated:

> [A] guidelines minimum sentence range calculated in violation of *Apprendi* and *Alleyne* is advisory only and that sentences that depart from that threshold are to be reviewed by appellate courts for reasonableness. To preserve as much as possible the legislative intent in enacting the guidelines, however, we hold that a sentencing court must determine the applicable guidelines range and take it into account when imposing a sentence. [*Id*. ___; slip op at 2 (citations omitted).]

When facts admitted by the defendant or found by the jury "were sufficient to assess the minimum number of OV points necessary for defendant's score to fall in the cell of the sentencing grid under which he or she was sentenced," the defendant did not suffer any prejudice and, therefore, "there is no plain error and no further inquiry is required." *Lockridge*, at ___ Mich ___; slip op at 32. However, when the facts admitted by the defendant or found by the jury were not sufficient to assess the minimum number of OV points required for the sentencing cell under which the defendant was sentenced, "an unconstitutional constraint actually impaired the defendant's Sixth Amendment right." *Id*. at 32. In such a case, if there is no upward departure, a defendant "can establish a threshold showing of the potential for plain error sufficient to warrant a remand to the trial court for further inquiry." *Id*. at ___; slip op at 32-33.

Here, defendant did not receive a departure sentence. Accordingly, whether he is entitled to a remand on Sixth Amendment grounds depends on whether his minimum guidelines range

would change if the OVs are scored solely based on facts admitted by him or found by the jury. See *id*. at ___; slip op at 32. Our review of the record indicates that the minimum range would, in fact, change.

a. OV 7

First, the trial court erroneously assessed 50 points for OV 7, which pertains to aggravated physical abuse. MCL 777.37. Fifty points are assessed when "[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered *during the offense*." MCL 777.37(1)(a) (emphasis added). The only issue at sentencing was whether defendant utilized "conduct designed to substantially increase the fear and anxiety" of the victim. *Id*. The Michigan Supreme Court construed that specific phrase in *Hardy* and concluded that the conduct must be "intended to make a victim's fear or anxiety greater by a considerable amount." *People v Hardy*, 494 Mich 430, 441; 835 NW2d 340 (2013). Accordingly, the Court summarized the relevant inquiry as follows: "(1) whether the offender engaged in conduct *beyond the minimum* required to commit the offense; and if so, (2) whether the conduct was intended to make a victim's fear or anxiety greater by a considerable amount." *Id*. at 443 (emphasis added). A court should first determine a baseline for the amount of fear or anxiety experienced by a victim of the type of crime at issue by "consider[ing] the severity of the crime, the elements of the offense, and the different ways in which those elements can be satisfied." *Id*. at 442-443 (footnote omitted).

MCL 777.37(1)(a), by its unambiguous terms, may only be scored based on the fear and anxiety that a victim suffers "during the offense." See *People v Spanke*, 254 Mich App 642, 646; 658 NW2d 504 (2003) ("If the language is unambiguous, judicial construction is precluded. We enforce an unambiguous statute as written." [Quotation marks and citation omitted]). Therefore, the sentencing court is precluded from considering conduct outside the sentencing offense for purposes of OV 7. See *People v McGraw*, 484 Mich 120, 126, 129, 133; 771 NW2d 655 (2009) ("Offense variables must be scored giving consideration to the sentencing offense alone, unless otherwise provided in the particular variable."). Here, the court considered defendant's conduct following the sexual assault, including the fact that defendant did not take the victim home immediately after the offense, the fact that defendant threatened her with a weapon the next day in order to intimidate her into silence, and the fact that the victim "barricaded" herself inside the tent the night after the incident. Because these facts occurred after the sentencing offense, the court erred in considering them.

Defendant's conduct during the offense was insufficient on its own to warrant an assessment of 50 points for OV 7. Defendant's sexual touching was elevated to CSC II based on his familial relationship with the victim. Compare MCL 750.520b(1)(b)(*ii*), with MCL 750.520d(1)(a). Because this relationship is the circumstance that elevates the severity of the charge, we find it reasonable to conclude that the baseline for fear and anxiety experienced by the victim is high, even though the sentencing offense only involved exterior touching and not penetration. In the instant case, defendant's only conduct *during* the offense that would have increased the victim's fear and anxiety was making "shushing" noises and putting his hand over her mouth. In these circumstances, this does not appear to be of the type of conduct *designed* to *substantially* increase a victim's fear or anxiety *by a considerable amount*, nor does it evidence

an intent on the part of defendant to do so. See MCL 777.37(1)(a); *Hardy*, 494 Mich at 443. Therefore, the trial court erred in assessing 50 points for OV 7.

b. OV 12

Secondly, there is no question that OV 12, which pertains to contemporaneous felonious criminal acts, MCL 777.42, was scored solely on the basis of judge-found facts. Defendant did not admit to any of the felonious acts, and the jury acquitted defendant of the other charges.

c. REMAND REQUIRED

Defendant's conviction under MCL 750.520c(b)(*ii*) is a class C felony. MCL 777.16y. Defendant's original OV score was 125 points, placing him at OV level VI. MCL 777.64. Subtracting the 50 points scored for OV 7 and the 25 points scored for OV 12 results in an OV score of 50 points and places him in OV level V, which affects the minimum range calculated under the sentencing guidelines. See *id*. Thus, it is not necessary for us to consider whether the other OVs were scored using judicially found facts, as it is clear that defendant can demonstrate "that his guidelines minimum sentence range was actually constrained by the violation of the Sixth Amendment." As such, given that defendant's sentence was not subject to an upward departure, defendant "can establish a threshold showing of the potential for plain error sufficient to warrant a remand to the trial court for further inquiry." *Lockridge*, ___ Mich at ___; slip op at 32-34, citing *United States v Crosby*, 397 F3d 103, 117-118 (CA 2, 2005).

B. OFFENSE VARIABLE SCORING

On appeal, defendant challenges the trial court's scoring of OV 2, OV 3, OV 4, OV 8, OV 10, and OV 12. We will address each argument in turn.[1]

1. STANDARD OF REVIEW

Defendant preserved his challenges by objecting to the points assessed for each variable at the sentencing hearing. See MCL 769.34(10); *Jackson*, 487 Mich at 796. Accordingly,

> the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence. Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which

[1] We will not further address the trial court's scoring of OV 7 given our conclusion *supra* that 50 points were erroneously assessed for that variable. In addition, we conclude that defendant has abandoned his challenge to OV 10. Although he cited OV 10 in his statement of the issue, he provided no discussion of this OV in his brief. See MCR 7.212(C)(7); *People v Kevorkian*, 248 Mich App 373, 388-389; 639 NW2d 291 (2001).

> an appellate court reviews de novo. [*Hardy*, 494 Mich at 438 (footnotes omitted).][2]

This Court reviews de novo, as a question of law, the proper interpretation of the sentencing guidelines. *People v Gullett*, 277 Mich App 214, 217; 744 NW2d 200 (2007). "A sentencing court may consider all record evidence before it when calculating the guidelines, including, but not limited to, the contents of a presentence investigation report, admissions made by a defendant during a plea proceeding, or testimony taken at a preliminary examination or trial." *People v Johnson*, 298 Mich App 128, 131; 826 NW2d 170 (2012) (quotation marks and citation omitted). "A defendant is entitled to be sentenced according to accurately scored guidelines and on the basis of accurate information." *McGraw*, 484 Mich at 131.

2. OV 2

First, defendant challenges the trial court's assessment of five points for OV 2, arguing that he did not possess or use a weapon during the commission of the sentencing offense. We disagree.

OV 2 is scored based on the lethal potential of a weapon possessed or used during the offense. MCL 777.32(1). Five points shall be assessed if "[t]he offender possessed or used a pistol, rifle, shotgun, or knife or other cutting or stabbing weapon," MCL 777.32(1)(d), one point shall be assessed if "[t]he offender possessed or used any other potentially lethal weapon," MCL 777.32(1)(e), and zero points shall be assessed if "[t]he offender possessed or used no weapon," MCL 777.32(1)(f). " 'Pistol', 'rifle', or 'shotgun' includes a revolver, semi-automatic pistol, rifle, shotgun, combination rifle and shotgun, or other firearm manufactured in or after 1898 that fires fixed ammunition, but does not include a fully automatic weapon or short-barreled shotgun or short-barreled rifle." MCL 777.32(3)(c).

Under Michigan law, "possession" generally comprises both actual and constructive possession. *People v Hill*, 433 Mich 464, 470; 446 NW2d 140 (1989) ("[Possession] is interchangeably used to describe actual possession and constructive possession, which often so shade into one another that it is difficult to say where one ends and the other begins." [Quotation marks and citation omitted.]). Likewise, there is no indication in MCL 777.32 that the Legislature intended the term "possession" to exclude constructive possession. "[A] person has constructive possession if there is proximity to the article together with indicia of control. Put another way, a defendant has constructive possession of a firearm if the location of the weapon is known and it is reasonably accessible to the defendant." *Id*. at 470-471 (citations omitted).

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[2] The Court's holding in *Lockridge* did "nothing to undercut the requirement that the highest number of points possible *must be* assessed for all OVs, whether using judge-found facts or not." *Id*. at ___; slip op at 29 n 28. Accordingly, given the continued relevance and use of the sentencing variables under the Michigan sentencing scheme, we conclude the standards of review articulated in *Hardy* remain viable after *Lockridge*.

The trial court scored OV 2 based on its findings that (1) the victim and defendant were located at an isolated campsite when the sentencing offense occurred, and (2) defendant had a weapon at the campsite, such that he constructively possessed the weapon before, during, and after the sentencing offense, regardless of whether he had it on his person during the sexual assault. Consistent with the trial court's conclusions, the testimony is clear from the victim and Blount that defendant had at least two pistols at the campsite during the trip. Likewise, it is evident that defendant was aware of the presence of firearms at the campsite and that he had the right to exercise control over them. See *People v Wolfe*, 440 Mich 508, 520; 489 NW2d 748, amended 441 Mich 1201 (1992). Moreover, the victim's testimony regarding defendant's use of the weapons on the day after the assault further confirms that defendant had easy access to the weapons throughout the trip. Thus, because defendant constructively possessed two pistols during the sexual assault, the trial court properly assessed five points for OV 2.

3. OV 3

Defendant next challenges the trial court's assessment of 10 points for OV 3, arguing that there is no evidence indicating that the victim sustained bodily injury requiring medical treatment. We disagree.

The statutory basis of OV 3 is MCL 777.33, which allows for an assessment of points when there is "physical injury to a victim." MCL 777.33(1). Ten points shall be assessed if "[b]odily injury requiring medical treatment occurred to a victim"; five points shall be assessed if "[b]odily injury not requiring medical treatment occurred to a victim"; and zero points shall be assessed if "[n]o physical injury occurred to a victim." MCL 777.33(1)(d)-(f). The statute states that the phrase " 'requiring medical treatment' refers to the necessity for treatment and not the victim's success in obtaining treatment." MCL 777.33(3). An assessment of points under OV 3 requires factual causation, meaning that the injury would not have occurred but for the defendant's criminal conduct. See *People v Laidler*, 491 Mich 339, 344-345; 817 NW2d 517 (2012). The term " 'bodily injury' encompasses anything that the victim would, under the circumstances, perceive as [an] unwanted physically damaging consequence." *People v McDonald*, 293 Mich App 292, 298; 811 NW2d 507 (2011). Precautionary medical treatment may be sufficient to assess 10 points for OV 3. *Id.*

Here, the victim was transported to a hospital upon her return from the camping trip so that a rape kit could be conducted and because she had not eaten any food between Thursday evening and Saturday evening. She expressly testified that she did not eat during that time period because she felt sick to her stomach due to the assault, not because she was experiencing flu-like symptoms. Therefore, it is evident that but for defendant's conduct, the victim would not have required medical treatment on the basis that she had not eaten. Thus, because the conduct giving rise to the sentencing offense was the "but for" cause of the victim's physical injury

requiring medical treatment, the trial court did not err in scoring OV 3 at 10 points.[3] See *Bosca*, ___ Mich App ___, ___; ___ NW2d ___ (2015) (Docket No. 317633); slip op at 23-24.

Finally, we reject defendant's alternative claim of ineffective assistance based on defense counsel's purported failure to object to the trial court's scoring of OV 3. Defendant's assertion is contrary to the record, as the sentencing transcript clearly indicates that defense counsel objected to the trial court's assessment of 10 points for OV 3.

4. OV 4

Defendant next asserts that the trial court erroneously assessed 10 points for OV 4 because the victim did not sustain serious psychological injury that required professional treatment. We disagree.

The statutory basis of OV 4 is MCL 777.34, which provides for an assessment of points if a victim sustained serious psychological injury. MCL 777.34(1). Ten points shall be assessed if "[s]erious psychological injury requiring professional treatment occurred to a victim." MCL 777.34(1)(a).

Here, the victim testified at trial that she is seeing a counselor because of defendant's behavior. Further, at sentencing, she reiterated that she attends counseling once or twice a week due to the incident and extensively discussed the deep impact of defendant's actions on her life and family, specifically noting severe panic attacks, nightmares, and an ongoing fear "of everyone and everything." The victim's impact statement in the presentence investigation report ("PSIR"), which included statements from both the victim and her mother, also revealed the psychological injury that the victim sustained due to defendant's actions. Thus, sufficient evidence existed to support a score of 10 points for OV 4. See *Bosca*, ___ Mich App at ___; slip op at 24; *People v Williams*, 298 Mich App 121, 124; 825 NW2d 671 (2012).

5. OV 8

Defendant also argues that the trial court erroneously assessed 15 points for OV 8 because the record includes no evidence that defendant "carried away or removed" the victim. We disagree.

OV 8 pertains to victim asportation or captivity. MCL 777.38(1). Fifteen points are assessed when "[a] victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense." MCL 777.38(1)(a). Zero points are assessed when "[n]o victim was asported or held captive." Asportation may occur where a victim voluntarily accompanied defendant; it does not require

[3] The trial court appeared to assess 10 points based on the prosecutor's inaccurate statement at the sentencing hearing that the victim received precautionary treatment for sexually transmitted disease. However, "we will not reverse the trial court's decision where it reached the right result for a wrong reason." *People v Mayhew*, 236 Mich App 112, 118 n 2; 600 NW2d 370 (1999).

force. *People v Dillard*, 303 Mich App 372, 379; 845 NW2d 518 (2013). "[A]n isolated location where criminal activities might avoid detection," *id*., or a location "where others [are] less likely to see defendant committing [the] crime[]," *People v Steele*, 283 Mich App 472, 491; 769 NW2d 256 (2009), may qualify as a place of greater danger under the statute. However, "[t]o establish asportation, the movement of the victim must not be incidental to committing an underlying offense." *Dillard*, 303 Mich App at 379 (quotation marks and citation omitted).

Here, the trial court found that the victim, who was under the age of sixteen, was transported to a remote campsite by defendant, who had control of the vehicle. At the campsite, the victim had "no other support system other than this individual who was in his own tent," i.e., Blount. The court noted that the transportation was "permissive," but one of the victim's family members expressed concern related to the victim camping with only defendant and Blount. The trial court determined that defendant "basically overruled that situation" and brought the victim to the remote area where the offense occurred.

We are not definitely and firmly convinced that the trial court erred in concluding that the campsite was a situation or place of greater danger. Testimony supports the trial court's finding that the campsite was isolated. There were no structures or improvements on the property; it was little more than a clearing in the woods off a dirt road. Likewise, no one was present at the isolated campsite but for the victim, defendant, and Blount. Thus, movement to the campsite increased defendant's control over the setting and minimized the possibility of detection. Moreover, consistent with the trial court's finding, the victim's aunt testified at trial that she had concerns about the victim going to the campsite with defendant because "the men party," and the aunt had told the victim that she should wait for her mother because it would not be appropriate for her to go alone. The victim's aunt also testified that when she requested that defendant ask the victim not to come with him, defendant "said that it was fine and [the aunt] was making a big deal out of nothing," before he proceeded to take the victim on the trip.

Considering this testimony, the trial court did not err in concluding that defendant asported the victim to a place or situation of greater danger, even though the victim willingly went on the camping trip. MCL 777.38(1)(a); see *Spanke*, 254 Mich App at 648 (finding that 15 points were properly assessed for OV 8 when "[t]he victims were moved, even if voluntarily, to defendant's home where the criminal acts occurred. The victims were without doubt asported to another place or situation of greater danger, because the crimes could not have occurred as they did without the movement of defendant and the victims to a location where they were secreted from observation by others.").

6. OV 12

Finally, defendant argues that the sentencing court improperly assessed 25 points for OV 12, which pertains to contemporaneous felonious criminal acts. We disagree.

Under MCL 777.42(1)(a), a trial court shall assess 25 points if "[t]hree or more contemporaneous felonious criminal acts involving crimes against a person were committed." The statute provides that "[a] felonious criminal act is contemporaneous if . . . (*i*) The act occurred within 24 hours of the sentencing offense," and "(*ii*) The act has not and will not result in a separate conviction." MCL 777.42(2)(a). When scoring this variable, the "court must look

beyond the sentencing offense and consider only those separate acts or behavior that did not establish the sentencing offense." *People v Light*, 290 Mich App 717, 723; 803 NW2d 720 (2010); see also *McGraw*, 484 Mich at 125. As stated above, "[a] sentencing court may consider all record evidence before it when calculating the guidelines, including, but not limited to, the contents of a presentence investigation report, admissions made by a defendant during a plea proceeding, or testimony taken at a preliminary examination or trial." *Johnson*, 298 Mich App at 131 (quotation marks and citation omitted). This includes evidence that establishes other criminal activities, even if charges arising from those activities resulted in acquittal. See *People v Compagnari*, 233 Mich App 233, 236; 590 NW2d 302 (1998).

The sentencing court recognized four contemporaneous felonies: (1) defendant touching the victim's clothed groin, see MCL 750.520c(1)(b)(*ii*) (second degree criminal sexual conduct), (2) digital penetration of the victim, see MCL 750.520b(1)(b)(*ii*) (first degree criminal sexual conduct), (3) that defendant took the victim's hand and placed it on his penis, see MCL 750.520c(1)(f)(*i*) (second degree criminal sexual conduct); *People v Carlson*, 466 Mich 130, 139-140; 644 NW2d 704 (2002), and (4) that defendant touched the victim's breast, see MCL 750.520c(1)(b)(*ii*) (second degree criminal sexual conduct). The victim's testimony supported each of these separate acts. Further, each of the acts was either uncharged or resulted in an acquittal, such that the additional acts will not result in separate convictions. MCL 777.42(2)(a)(*ii*). There was also testimony regarding the defendant's act of threatening the victim with a firearm the next morning, see MCL 750.82 (felonious assault); *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999) ("The elements of felonious assault are (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery."), which provides evidence of an additional contemporaneous felony, as it occurred within 24 hours of the sentencing offense. MCL 777.42(2)(a)(*i*). Thus, the trial court properly assessed 25 points for OV 12.

IV. MITIGATING CIRCUMSTANCES AND REHABILITATIVE POTENTIAL

Next, defendant argues that the trial court imposed an unconstitutional sentence because it failed to consider mitigating circumstances, specifically (1) his strong family support, (2) his extensive substance abuse history, and (3) an inference of "serious mental disease or defect" based on the nature of his underlying conviction. We disagree.

A. STANDARD OF REVIEW

Because defendant did not offer mitigation evidence at sentencing, this issue is not preserved for appeal. We review unpreserved issues for plain error affecting substantial rights. *Carines*, 460 Mich at 774. To the extent defendant also raises an ineffective assistance claim, our review is limited to mistakes apparent on the record because he did not move for a new trial or *Ginther*[4] hearing. *People v Petri*, 279 Mich App 407, 410; 760 NW2d 882 (2008).

B. ANALYSIS

[4] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

Defendant's arguments are meritless. First, as defendant acknowledges in his brief on appeal, a trial court is not required to consider mitigating circumstances when it sentences a defendant. See *People v Johnson*, 309 Mich App 22, 34-35; 866 NW2d 883 (2015) ("Defendant next argues that the trial court failed to consider various mitigating factors, such as his mental health and substance abuse histories, his family support, and his remorse. However, as defendant readily acknowledges, the trial court was not required to consider such mitigating factors when it sentenced him."), rev'd in part on other grounds 497 Mich 1042 (2015), citing *People v Osby*, 291 Mich App 412, 416; 804 NW2d 903 (2011); see also *People v Nunez*, 242 Mich App 610, 617-618; 619 NW2d 550 (2000). Contrary to defendant's claims, the federal caselaw cited in his brief on appeal concerning capital cases does not establish that the trial court was required to consider the mitigating circumstances that he identifies in this case. See *Graham v Collins*, 506 US 461, 484-489; 113 S Ct 892; 122 L Ed 2d 260 (1993) (THOMAS, J., concurring); *Skipper v S Carolina*, 476 US 1, 4; 106 S Ct 1669; 90 L Ed 2d 1 (1986); *Eddings v Oklahoma*, 455 US 104, 113-115; 102 S Ct 869; 71 L Ed 2d 1 (1982).

Further, defendant has failed to establish that the trial court failed to consider each of the mitigating circumstances identified by defendant on appeal, or that each of these circumstances should be deemed a mitigating factor. Defendant provides no citation to the record indicating that he has "strong family support," and he never asserted this factor as a mitigating circumstance during sentencing. A "[d]efendant may not leave it to this Court to search for a factual basis to sustain or reject his position." *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001) (quotation marks and citation omitted). Defendant's history of substance abuse was expressly discussed by the PSIR, and there is no indication in the record that the trial court failed to consider this information. Moreover, on appeal, defendant has not explained why his ongoing failure to gain control of his extensive substance abuse should be considered a mitigating, as opposed to an aggravating, factor. Finally, we find no factual basis for defendant's claim that, "given the nature of the alleged offense, an inference can be made that he has a serious mental disease or defect." This argument is simply unsupported by the record, especially given that the PSIR explicitly indicates that defendant has no psychiatric history, and that no mental health problems were reported. See *People v Callon*, 256 Mich App 312, 334; 662 NW2d 501 (2003) ("A presentence report is presumed to be accurate and may be relied on by the trial court unless effectively challenged by the defendant."). Likewise, neither defendant nor defense counsel asserted any psychological or psychiatric issues at sentencing. Therefore, we reject defendant's argument that the trial court erred in failing to consider defendant's alleged mental condition. See *Johnson*, 309 Mich App at 35. Therefore, because there is no evidence that the trial court failed to consider relevant mitigating factors, we find no basis for concluding that the trial court abused its discretion or committed a plain error affecting defendant's substantial rights. *Nunez*, 242 Mich App at 618.

Defendant also argues that his due process rights were violated because the court did not conduct a proper assessment of his rehabilitative potential through substance abuse and psychiatric treatment, such that his sentence was based on inaccurate information. Although a defendant is entitled to receive a sentence based on accurate information, *McGraw*, 484 Mich at 131, defendant's claim is meritless. Pursuant MCR 6.425, a trial court is not required to order or otherwise conduct an assessment of a defendant's rehabilitative potential, despite defendant's policy arguments to the contrary. Instead, under MCR 6.425(A)(1)(e), a probation officer is required to include the following in the PSIR regarding a defendant's substance abuse and

mental health history: "Prior to sentencing, the probation officer must investigate the defendant's background and character, verify material information, and report in writing the results of the investigation to the court. The report must be succinct and, depending on the circumstances, include: . . . (e) the defendant's medical history, substance abuse history, if any, and, if indicated, a current psychological or psychiatric report . . . ."[5] Defendant does not claim that the PSIR includes inaccuracies regarding his substance abuse or mental health history, nor does he identify any other basis for concluding that he was sentenced based on inaccurate information. Thus, defendant has failed to establish a plain error affecting his substantial rights. *Carines*, 460 Mich at 774.

Finally, we need not consider defendant's argument that his sentence was excessive given our conclusion that resentencing is required. Likewise, given defendant's failure to establish plain error based on mitigating circumstances or rehabilitative potential, defendant has not demonstrated ineffective assistance of counsel. "Trial counsel is not required to advocate a meritless position." *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

V. RESTITUTION

Finally, defendant challenges the trial court's order of restitution arising from the medical bill for sexually transmitted disease testing. Because defendant failed to object to the imposition of restitution, this issue is unpreserved, see *People v Griffis*, 218 Mich App 95, 103-104; 553 NW2d 652 (1996), and reviewed for plain error affecting substantial rights, *Carines*, 460 Mich at 774.

Contrary to defendant's characterization of the bill on which the restitution was based, it is apparent that the hospital bill was for mandatory testing, as required under MCL 333.5129(3), (10), and (11). Under the statute, the district court shall order the examination or testing of a defendant bound over to the circuit court for a violation of MCL 750.520c "for venereal disease, hepatitis B infection, and hepatitis C infection and for the presence of HIV or an antibody to HIV" if the court determines that there is reason to believe that the violation of MCL 750.520c involved penetration or exposure to the defendant's bodily fluid. MCL 333.5129(3). Additionally, a court is permitted to order the defendant to pay for the actual and reasonable costs of the examination or testing upon conviction. MCL 333.5129(10), (11).

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[5] Defendant's reliance on *United States v Lara-Velasquez*, 919 F2d 946, 956-957 (CA 5, 1990), and *People v Triplett*, 407 Mich 510, 513-514; 287 NW2d 165, 166 (1980), is misplaced. *Lara-Velasquez*, which discussed the consideration of rehabilitative potential in sentencing under the *federal* sentencing guidelines, includes no requirement that a trial court must conduct an assessment of a defendant's rehabilitative potential through substance abuse and psychiatric treatment. See *Lara-Velasquez*, 919 F2d at 956-953. Likewise, in *Triplett*, the Michigan Supreme Court held that a reasonably updated PSIR must be used in felony sentencing; the Court did not establish a requirement that a sentencing court must conduct an assessment of the defendant's rehabilitative potential in addition to the investigation performed in preparation of the PSIR. *Triplett*, 407 Mich at 513-516.

On July 13, 2011, the district court entered an order binding over defendant to the circuit court, and two orders were entered for counseling and testing for disease and infection. The orders stated, inter alia, "The defendant/juvenile shall be confidentially tested for veneral disease, hepatitis B and C infection, and for the presence of HIV or an antibody to HIV . . . ." Moreover, one of the orders stated, "The defendant/juvenile shall pay, to the clerk of the court, the costs of examination/testing by a local health department or assigned counseling and testing agency within 30 days after this order is issued." Consistent with the order, the bill at issue indicates that defendant underwent such testing, at the expense of Roscommon County, on July 29, 2011. However, there is no indication in the record that defendant remitted payment to the clerk of the court for the cost of the testing, i.e., $396.30. Therefore, consistent with MCL 333.5129(10) and (11), the trial court did not commit a plain error affecting defendant's substantial rights when it ordered defendant to pay $396.30 for the cost of the testing following his conviction.

Moreover, the trial court did not plainly err in ordering reimbursement to the county for this amount as restitution. It is apparent from the bill that the hospital did not receive payment for the testing for several months after the testing, as the bill was created on November 9, 2011, and the bill lists Roscommon County as the payer of the outstanding balance. The county is a governmental entity, which—contrary to defendant's claims on appeal—qualifies as a victim under the Crime Victim's Rights Act, MCL 780.751 *et seq*. Under the Act, "victim" is defined as "an individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a crime." MCL 780.766(1). For purposes of MCL 780.766(2), among other subsections, the definition of victim "includes a sole proprietorship, partnership, corporation, association, governmental entity, or any other legal entity that *suffers direct* physical or *financial harm as a result of a crime*." *Id*. (emphasis added). MCL 780.766(2) provides:

> (2) Except as provided in subsection (8), when sentencing a defendant convicted of a crime, the court shall order, in addition to or in lieu of any other penalty authorized by law or in addition to any other penalty required by law, *that the defendant make full restitution to any victim of the defendant's course of conduct that gives rise to the conviction* or to the victim's estate. . . . [Emphasis added.]

Thus, we discern no error in the trial court's order that defendant pay $396.30 in restitution to the county in reimbursement for the statutorily required testing. See MCL 780.766(1); *People v Crigler*, 244 Mich App 420, 425-426; 625 NW2d 424 (2001) (governmental entities may receive restitution). Likewise, defense counsel was not ineffective in failing to object to the order of restitution, as "trial counsel is not required to advocate a meritless position." *Snider*, 239 Mich App at 425.

VI. CONCLUSION

For the reasons stated above, we affirm defendant's conviction and the trial court's order of restitution. However, we remand this case "to the trial court to determine whether that court would have imposed a materially different sentence but for the constitutional error" arising from the fact that that defendant's sentencing guidelines range was actually affected by a violation of the Sixth Amendment. *Lockridge*, ___ Mich at ___; slip op at 34. If the trial court determines that it would have imposed a materially different sentence, relief from the judgment is required

in the form of resentencing, as defendant will have incurred actual prejudice for purposes of MCR 6.508(D)(3)(b)(iv) ("As used in this subrule, "actual prejudice" means that . . . in the case of a challenge to the sentence, the sentence is invalid."). We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Cynthia Diane Stephens
/s/ Michael J. Riordan